(ii) The defendant shall not be required to pay into Court the sum mentioned in the summons or to give security therefor unless the Court thinks his defence not to be **prima facie** sustainable or feels reasonable doubt as to its good faith."

I see no difficulty in the construction of this section.

Sub-section (ii) requires, before any question can arise of ordering payment or security for the amount of the claim, that the Court shall either think the defence not to be *prima facie* sustainable or feel a reasonable doubt as to its good faith.

But when the Court so thinks or feels, that does not mean that an order must follow as a matter of course.

There still remains a discretion to be exercised, on material before the Court in the particular case, as to whether or not an order for payment or security should be made.

It is hardly possible or perhaps desirable to formulate any exact rules for the exercise of that discretion; but this much may, I think, be said, that it must depend upon the degree of certainty with which the Court thinks the defence *prima facie* not sustainable or on how strong is the feeling of reasonable doubt as to the good faith.

In the present case it is not on record whether the learned Registrar thought the defence not sustainable or felt doubt or both.

However, both Counsel agree that the Registrar did state that he felt a reasonable doubt of the good faith of the defence, and Counsel for the plaintiff says that the Registrar also thought the defence *prima facie* not sustainable.

There is now before me, put in during the hearing of this appeal, fresh evidence by affidavit from the defence which was not before the Registrar and which materially affects the question whether the defence is *prima facie* sustainable.

It is not now contended by Counsel for plaintiff that it is not *prima facie* sustainable.

I have therefore decided, while bearing in mind that the exercise of discretion under this section is not to be lightly interfered with, to vary the order of the Registrar by reducing the amount for which security is to be given—under section 460 (i)— to $5,000.

The costs will be costs in the cause, save that the defendant shall not in any event get the costs occasioned by the fresh affidavits and the further hearing on the 8th July, 1940, resulting therefrom.

Order of Registrar varied

[ORIGINAL CIVIL JURISDICTION]

CUSSEN, J.

August 31, 1940.

LIM SONG vs. W. J. P. GRENIER.

[SELANGOR CIVIL SUIT No. 38 of 1940]

The Mining Enactment (Cap. 147), section 36 and Schedule X—Sub-lease for "the remaining periods of the said mining leases"—Mining leases renewed by Resident—Renewal period not covered by sub-lease.

In June, 1935, the plaintiff sub-leased certain mining lands to the defendant in accordance with the provisions of the Mining Enactment. The sub-lease was "for the remaining periods of the said mining leases." One of the leases was due to expire on the 25th June, 1937, and in May, 1936, the plaintiff applied to the Resident for renewal of that lease. The Resident extended the term of the lease until the 5th September, 1943. The plaintiff brought this action claiming, **inter alia** a declaration that the sub-lease did not cover the period of the lease subsequent to its original date of expiry.

Held, that the construction of the sub-lease must be confined to the document itself, which is of the highest degree of formality. The form of a memorandum of sub-lease is prescribed and set out in Schedule X, which contains as foot-note (b):

"(b) Add term of sub-lease, e.g., 'five years' or 'of the said lease or of any renewal thereof for which renewal the sub-lessor hereby undertakes to apply if so desired by the sub-lessee'."

The defendant should have followed this direction if he wished the period of the sub-lease to extend over any renewal period of the lease, and the sub-lease accordingly expired on the 25th June, 1937.

P. C. Au Yong for plaintiff.

H. Y. Teh for defendant.

Cussen, J.—Mining lease No. 3900 was granted by the Ruler of the State to the plaintiff as lessee on 26th June, 1928; the period of the lease being for nine years.

On the 6th June, 1935, the plaintiff sub-leased the land to the defendant under the provisions of section 36 (i) of the Mining Enactment (Cap. 147). Section 36 (i) reads:

"36. (i) If any lessee wishes to sub-lease his land such lessee and the intended sub-lessee shall execute and present together with the mining lease a memorandum of sub-lease in the form in Schedule X with such variations of the form but not of the substance as the Collector may permit, and thereupon the Collector shall register the same...."

The sub-lease executed by the plaintiff and defendant of mining lease 3900 is in the form in Schedule X and is exhibited to the plaint.

Clause 3 of this sub-lease reads as follows:

> "Do hereby sub-lease to the said Ho Man all the said pieces of mining land and estimated to contain 54 acres 0 roods 25 poles more or less for the remaining periods of the said mining leases subject to the provisions of the Mining Enactment 1928 and to the following conditions, restrictions and exceptions:

(This sub-lease was in respect of two mining leases, i.e., M. L. 3900 and M. L. 4034. This suit is concerned only with M. L. 3900).

Then the sub-lease contains the Conditions, etc., set out in Schedule X to which are added four further conditions.

Only one of these is relevant to the issue in this suit and is as follows:

> "11. That in consideration of the grant of this sub-lease the sub-lessee undertakes to re-transfer the leases of the land comprised in this sub-lease to the sub-lessors when the Government renews the leases in favour of the sub-lessees."

The period of M. L. 3900 being for nine years it was due to expire on 26th June, 1937.

In May, 1936, the plaintiff applied for a renewal of M. L. 3900 under the provisions of section 24 of the Enactment.

Section 24 reads as follows:

> 24. (i) Any lessee desirous of obtaining a renewal of his mining lease shall make a written application therefor to the Collector not less than twelve months before the expiration of the current term of his mining lease.
>
> (ii) The Resident shall consider such application and may in his absolute discretion
>
> (a) by order under his hand direct that the term of such mining lease be extended subject to the payment of such premium, if any, and upon such covenants and conditions and for such period as may be specified in such order, or
>
> (b) grant to the applicant a fresh mining lease over such land, subject to the payment of such rent and premium and upon such covenants and conditions as he may impose, or
>
> (c) reject such application.
>
> (iii) The Resident may consider any application not made within the time limited for such purpose by sub-section (i) but shall not be bound to do so.
>
> (iv) Any order made under paragraph (a) of sub-section (ii) may be presented to the proper registering authority and shall thereupon, subject to the provisions of law in force for the time being relating to registration, be registered.
>
> (v) No order made under paragraph (a) of sub-section (ii) shall have effect until registered."

It is evident then that, at the absolute discretion of the Resident, a renewal of a mining lease may take one of two forms, i.e. (a) an extension of the term by endorsement or (b) a grant of a fresh mining lease.

In the case of the plaintiff's application the Resident extended the term of M. L. 3900 until 5th September, 1943.

The question for determination in this suit is whether the sub-lease of M. L. 3900 to the defendant of 6th June, 1935, expired on 25th June, 1937, or whether it continues in force until the expiration of the extended term of the lease, i.e., 5th September, 1943.

This depends upon what meaning is to be given to the words in the sub-lease—"the remaining periods of the said mining leases."

Considering these words by themselves, I see no difficulty. The word "remaining" is of present force; the words might be written as "the periods that remain of the said mining leases" and clearly contemplate and refer to the period remaining at the date of the execution of the sub-lease; that is to say a period from 6th June, 1935, to 25th June, 1937.

The words do not cover a renewal period.

The construction of this document—this sub-lease—must be confined to the document itself. A sub-lease is a matter required by law to be in a prescribed Statutory form, i.e., Schedule X, a document of the highest degree of formality; and its construction is governed by section 92 of the Evidence Enactment (Cap. 10).

No evidence of any oral agreement is admissible to vary the terms of the sub-lease; to vary the plain meaning of any of its terms.

We must look only at the sub-lease itself and at the Statute, i.e., the Mining Enactment.

In the sub-lease the only clause that appears to be relevant is Condition 11 (*supra*) and that, in my opinion, only serves to confirm the conclusion I have arrived at, and that the intention of the parties to this sub-lease was that it covered only the then remaining period of the lease.

I say this because Condition 11 clearly proves that the parties had in contemplation the position when the lease was due for renewal; and it is, I think, a reasonable and the correct inference that if the sub-lessee (the defendant) intended to obtain for himself a contractual right for a sub-lease over any renewal period of the lease, he would have expressly created for himself such a right when undertaking, as he does in Condition 11, to re-transfer the leases to the sub-lessors if it should happen that "renewal" was given to him.

It would of course not be a "renewal" but provided for the position that might arise if under section 24 of the Enactment the Resident rejected the plaintiff's application for renewal and granted instead a lease to the defendant.

Again the form of a memorandum of sub-lease prescribed (Schedule X) is relevant.

Clause 3 of the form reads as follows:

> "Do hereby sub-lease to the said....(a) all that portion of the said piece of mining land coloured red upon the plan hereunto attached....for the period of (b)....subject to the provisions of the Mining Enactment and to the following conditions, restrictions and exceptions:"

The foot-note (b) to the Schedule is as follows:

> "(b) Add term of sub-lease, e.g., 'five years' or 'of the said lease or of any renewal thereof for which renewal the sub-lessor hereby undertakes to apply if so desired by the sub-lessee'."

Here we have the Enactment itself telling the sub-lessee what he should have inserted in the sub-lease if he wishes its period to extend over any renewal period of the lease, and this would be effective whether renewal under section 24 was given by means of an extension of the terms by endorsement or by the grant of a fresh lease.

I might perhaps also point to the reply of the defendant to the letter from the Assistant Warden of Mines dated the 20th May, 1936, inquiring if he (defendant) as sub-lessee had any objection to the renewal of M.L. 3900 to the lessee (plaintiff). Defendant's reply was that he had "no objection to the renewal of this lease to the present lessees, if they agree to renew the sub-lease on the same terms and conditions, on the issue of the new lease.

I find then that the contention of the defendant that the sub-lease is still unexpired and will not expire until the end of the extended period fails; and I hold that this sub-lease expired on 25th June, 1937.

I therefore give judgment for the plaintiff in terms of prayers (a), (b), (c) and (e) of the plaint.

Judgment for plaintiff with costs

[APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

September 7, 1940.

NG EE vs. PUBLIC PROSECUTOR.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 11 of 1940]

Road Traffic Enactment (No. 17 of 1937), section 80—Public Service Vehicles (Conditions of Fitness, Equipment and Use) Rules, 1937, rules 3 and 65—Criminal Procedure Code (Cap. 6), section 316—Evidence Enactment (Cap. 10), section 91—Liability of conductor of Public Service Vehicle—Substitution of conviction under different charge—Evidence necessary.

The appellant, being an omnibus conductor, was charged and convicted under section 80 (6) of the Road Traffic Enactment with having caused the omnibus in his charge to be used not in conformity with the conditions of the licence in respect of such vehicle, by conveying 17 passengers instead of 16. It was argued on behalf of the appellant that section 80 does not apply to a conductor, but only to the licensee of the vehicle: furthermore that the conditions of the licence had not been proved before the Magistrate. The Deputy Public Prosecutor asked the Court to alter the conviction to one for an offence against Rules 3 and 65 of the Public Service Vehicles (Conditions of Fitness, Equipment and Use) Rules 1937, submitting that the facts before the Court proved an offence under these rules.

Held, that the appellant, being merely the conductor of the vehicle, was not liable to be charged with any offence under section 80 of the Enactment.

The power of substitution of a conviction under a different provision of the law for the conviction found by the Magistrate is to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of the evidence in the case, that to do so can in no way prejudice the case of the accused. It must be clear that if the substituted charge had in fact been the original charge the proceedings at the trial would have taken the same course, and the evidence recorded been the same—that the prosecution evidence would have been unchanged (substantially) and the accused's defence the same.

In order to prove an offence under Rule 65 the prosecution must prove by admissible evidence what the authorised seating capacity of the vehicle is. This is recorded on the licence and applying section 91 of the Evidence Enactment no evidence may be given in proof of the terms of such matter except the licence or secondary evidence of its contents, when admissible. Neither the licence nor secondary evidence of its contents were in evidence before the Court, and the charge proposed to be substituted had not been proved.

J. T. Tosswill for appellant.

J. F. Draper, Deputy Public Prosecutor, for respondent.

Cussen, J.—This appellant was charged before the Court of the Magistrate, Raub, as follows: